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Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

ELEANOR L. BROBST, JEAN BERGER, SHARON M. MIDDLECAMP, ROBERT BUCKWALTER, MARIAN E. STETTLER, MADELINE DORNEY, JEAN R. BERGER, Executrix of Estate of MARIE M. FRITZ, VERNA S. UNDERCUFFLER, CLAUDIA WOTTA, ALICE S. MEISSNER, DENNIS G. COOK, CAROL SNYDER, DONALD LAKOVITZ, CARMELLA HAWK, ELAINE SEISLOVE, BERNARD POLIT and SCOTT REHRIG,

Petitioners

versus

COLUMBUS SERVICES INTERNATIONAL,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Richard J. Orloski,
Counsel for Petitioners
ORLOSKI & HINGA
1005 S. Cedar Crest Boulevard
Allentown, Pa 18103
(215) 433-2363

I. WHETHER OR NOT THE TRIAL COURT DENIED PLAINTIFF'S THEIR RIGHT TO A FAIR TRIAL BY IMPROPERLY EXCLUDING EVIDENCE OF THE SEX OF PERSON EARNING THE HIGHER LABOR RATE ON PLAINTIFFS' CLAIM UNDER THE EQUAL PAY ACT UNDER THE ERRONEOUS THEORY THAT SEX DISCRIMINATION WAS NOT PART OF PLAINTIFFS' CLAIM UNDER THE STATUTE?

II. WHETHER OR NOT THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE TWO OR THREE YEAR STATUTE OF LIMITATIONS OF THE EQUAL PAY ACT EXCLUDED DAMAGES INCURRED AFTER THE FILING OF THE COMPLAINT AND FURTHER ERRED IN HOLDING THAT THE STATUTE OF LIMITATIONS WAS NOT TOLLED DURING THE PERIOD OF TIME WHILE PLAINTIFFS' CLAIM WAS FILED IN THE EASTERN DISTRICT OF PENNSYLVANIA?

III. WHETHER OR NOT THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE FROM WHICH THE JURY COULD INFER THAT, WHERE A DEPOSITION WAS UNILATERALLY TERMINATED BY DEFENDANT'S COUNSEL, THE INTERFERENCE WITH THE CONSTITUTIONAL RIGHT OF CROSS-EXAMINATION CONSTITUTED AN "ADVERSE INFERENCE" THAT FURTHER ANSWERS WOULD BE PREJUDICIAL TO THE DEFENDANT?

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STATUTES

29 U.S.C. Section 201 et seq.

NO. _____

ELEANOR L. BROBST, et al.,

Petitioners

versus

COLUMBUS SERVICES INTERNATIONAL,

Respondent

PETITION FOR A WRIT OF CERTIORARI

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Third Circuit.

OPINIONS BELOW

The judgment and Order of the United States Court of Appeals, Third Circuit, rendered July 27, 1987 is recorded at ___F.2d ____(3d Cir, 1987) and appears at page of the Appendix herein. Order of the United

States Court of Appeals, Third Circuit, rendered 8/17/87 is unrecorded and appears at page of the Appendix herein.

JURISDICTION

The final judgment of the United States Court of Appeals, Third Circuit, dated August 17, 1987, and the Writ of Certiorari is timely filed within ninety days thereof. The jurisdiction of this Court rests upon 28 U.S.C. Section 1254(1) and Rule 17 of the Court.

FEDERAL PROVISIONS INVOLVED

"No employer having employees subject to any provisions of this section [minimum wage provisions of the FLSA] shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex...."

Equal Pay Act of 1963, effective June 10, 1963. 29 U.S.C. 206(d).

[Private right of action added by Section 10(a) of the Fair Labor Standars Amendments of 1977, Pub. L. No. 95-151, 91 Stat. 1952 (codified at 29 U.S.C. Section 216(b)].

STATEMENT OF THE CASE

a.) Procedural History of Case

Plaintiffs initially filed suit in the United States District Court for the Eastern District of Pennsylvania on August 31, 1979 alleging a violation of the Equal Pay Act, 29 U.S.C. Sections 206(d), 215(a)(2), and 216(b), and a prior Consent Decree involving the same defendant dated January 11, 1977, and issued in the United States District Court for the Western District of Pennsylvania. On September 16, 1982, the United States District Court for the Eastern District of Pennsylvania, per Troutman, J. granted the Defendant's Motion to Dismiss the case without prejudice, indicating that venue for the action rested only in the Western District of Pennsylvania. Plaintiffs timely filed an appeal from this Order to the United States Court of Appeals, Third Circuit, at No. 82-1682, and on or about May 6, 1983, this Court affirmed the dismissal, without prejudice, without opinion.

while the Plaintiffs were appealing the dismissal, without prejudice, to this Court, Plaintiffs also refiled the action before the United States District Court for the Western District of Pennsylvania at No. 82-2283, and the matter was assigned to Mencer, J. Defendant promptly filed a Motion To Dismiss the second action alleging that the usage of the executed consents from the first action as part of the filing of the second action was improper under the Equal Pay Act. On February 8, 1983, the Court, per Mencer, J., ruled that the original consents were properly filed in the Eastern District, and that the photocopies of the originals were sufficient inasmuch as the second action was a continuation of the original action consistent with Judge Troutman's decision dismissing the Complaint on venue grounds, without prejudice.

Thereafter, on March 28, 1984, the United States District Court for the Western District of Pennsylvania granted summary judgment

in favor of Defendant, and against Plaintiffs. Plaintiffs again timely appealed to the United States Court of Appeals for the Third Circuit at no. 84-3236, and this Court, per Sloviter, J. reversed the trial court on May 2, 1985 and remanded the case back to the trial court for a jury trial.

Prior to trial, the Defendant took the deposition of James Clifton Sutherland on July 25, 1986 commencing at 9:00 A.M. for the express purpose of using the deposition at trial in lieu of the appearance of the witness. In the middle of the deposition, Defendant's counsel announced for the very first time that the deposition was going to be unilaterally terminated at 3:00 P.M. At 3:00 P.M., consistent with the earlier representation, Defendant unilaterally terminated the deposition, and both the witness and Defendant's counsel left in the middle of cross-examination.

Prior to trial and consistent with local practice, the parties exchanged exhibits, and formally responded on the record concern-

ing "admissability" and "authenticity" to the other parties exhibits. Defendant specifically indicated that it was stipulating both to the "authenticity" and the admissability" of the records of the Defendant concerning the actual payroll registers of the Plaintiffs for the years 1977, 1978, 1979, 1980, 1981, 1982 and 1983. The payroll records were relevant to show the damages suffered by the Plaintiffs for the years 1977 through 1983. The only damage objection that the Defendant preserved was to Plaintiffs' Exhibit No. 10 which was a summary of the total hours worked by Plaintiffs, and a calculation of total damages for the said hours using the salary differential of $.40 per hour.

At the trial, the Plaintiff's counsel gave an opening statement relying upon the prior representation that Plaintiffs' Exhibits 9 a-g (1977-1983) were both authentic and admissable. Immediately after giving his opposing statement, Plaintiffs' counsel moved Exhibits 9 a through 9 g into evidence, and

Defendant's counsel [illegible]

> "MR. PUSKAR: ...I am not sure anymore why they are going to be offered and what they are supposed to show.
> THE COURT: You are saying then relevance is your objection?
> MR. PUSKAR: At least I don't know how they are relevant. I knew at one time but I don't think I know now."

Given defense counsel's absent-mindedness and his prior written stipulation both to authenticity and admissability, the court overruled the belated objection, and admitted the documents into evidence.

During the course of the trial, however, the trial court reversed its position, and held that evidence of damages prior to 79/80 was not admissable, and was not properly before the jury.

During the course of the trial, Plaintiffs twice offered to show that the sex of the "higher paid" laborer was male, was always male, and was always exclusively male. The trial court excluded this evidence under Defendant's proferred theory that sex discrimination has nothing to do with an Equal Pay

At the conclusion of of the trial, the jury found for Defendant and against Plaintiffs. A timely appeal to the Third Circuit followed. After hearing, the Third Circuit entered an Order denying Plaintiffs' appeal to which Plaintiffs petitioned said court for Rehearing. On August 17, 1987, the Third Circuit denied Plaintiffs' Petition for Rehearing. Plaintiffs file this timely Petition For A Writ of Certiorari which is now before this Honorable Court for disposition.

b.) Statement of Facts

Plaintiffs, present or former custodial workers at Cedar Crest College in Allentown, Pennsylvnaia offered evidence indicating that there were two categories of maintenance workers at the college since Defendant, Columbus Services International took over the maintenance obligation at the college. Specifically, Plaintiffs' evidence was that outside maintenance work was done at a $.40 per hour premium under the classification of

"custodians".

During the trial, Plaintiffs offered evidence indicating that the custodian work required equal skill, effort and responsibility, and was performed under similar working conditions. At no point in the trial did the trial court preclude evidence concerning the fact that Plaintiffs were contending that the actual work experience of the predominately female custodians was equal in skill, effort and responsibility to the laborers.

When Plaintiffs attempted to show that the job of "laborer" was--and has always been--an exclusively male position, however, the trial court specifically prevented the Plaintiffs from proving that the laborer job was always given to the men:

> "Q. The people the Judge has just been talking about, are those people paid the same rate as the custodians?
> A. No, sir.
> Q. The people that the Judge was talking about, what is their sex?
> A. They are all males.
> MR. PUSKAR: Your Honor, I am going to ask that be stricken. This is not a civil rights case.

they are. It has no relevancy to this cause of action, this lawsuit at all.

THE COURT: We will sustain the objection and strike the last question and answer and ask the jury to disregard it."

"Q. The laborers are practically all now male and have always been male.
A. Yes. That's correct.

MR. PUSKAR: Same objection, your Honor.

THE COURT: All right. We, of course, sustain the objection. Any other questions of the witness, Mr. Orloski?"

Hence, the trial court was permitting the Plaintiffs to attempt to convince the jury that the "custodian" job was equal in skill, effort and responsibility to the job of "laborer", but the Court was affirmatively telling the jury that the sex of the laborer was irrelevant and that this was not a civil rights case.

Prior to the trial and consistent with local practice, the parties exchanged exhibits, and indicated, in writing, their position both "authenticity" and "admissability" of the other sides' exhibits. Plaintiffs marked

a total of 10 exhibits which Defendant agreed to nearly all the records admissability and authenticity. The lawyer who signed the written stipulation--Paul M. Puskar, Esquire--was exactly the same lawyer who acted as trial counsel at trial.

For the reasons never articulated by defense counsel, the Defendant inexplicably changed its mind on the date of trial and objected to all of Plaintiffs' Exhibit No. 9.

Plaintiffs' case was simple: Laborers were exclusively male, custodians were predominately female, and the custodians were paid $.40 an hour less for performing equal work which required equal skill, effort and responsibility. Hence, the hours worked by Plaintiffs were admissable on damages because they were entitled to $.40 an hour for each hour worked since June 30, 1976. Defendant belatedly objected to the payroll registers after initially stipulating to authenticity and admissability, and the documents were introduced into evidence in Plaintiffs' case

After Plaintiffs rested, and on the defense side of the case, there was a bizarre procedural ruling. Even though the records since June 30, 1976 were referred to in Plaintiffs' opening statement and admitted into evidence, the trial court reversed itself, and indicated that damages must only be calculated up to the date of filing of the Amended Complaint in the U.S. District Court for the Western District of Pennsylvania.

The trial court on the third day of trial--and one day after Plaintiffs rested their case in chief--indicated that it would not allow Plaintiffs to prove damages from June 30, 1976, but instead would limit all damages from a two--or three--year period before the filing of the Amended Complaint in the U.S. District Court for the Western District of Pennsylvania, namely April 18, 1983:

> "THE COURT: We are of the view that the proper date to relate that period back from is the date of April 18, 1983. We think that is when the consents were filed in this suit,

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In fairness to the trial court, part of the reason for this date selection was because defense counsel affirmatively misled the trial judge, caused the trial court to overlook its own "Memorandum Opinion and Order of February 8, 1983", and made the judge believe that the statutory consents agreeing to sue were not filed until April 18, 1983:

> MR. PUSKAR: I do remember a problem arose because the consents used on the original Complaint were consents that had been used in the Eastern District. That suie was dismissed. We brought it up to Your Honor and you told them to file new consents. Maybe I dreamed that some night, but I am pretty sure that is what happened."

In actual fact, the trial judge had ruled just the opposite, namely the statutory consents to sue which were filed in the original action with the U.S. District Court for the Eastern District of Pennsylvania on August 31, 1979 were valid for purposes of processing this action after Troutman, J., dismissed the action without prejudice, on venue grounds in the Eastern District of Pennsylvania.

consents in the Eastern District as valid, however, the trial court again reversed itself, but this time held that the statute of limitations precluded any recovery after October 29, 1982 (the date of filing of Complaint in the Western District of Pennsylvania), and any recovery before two or three years before October 29, 1982:

> "THE COURT: Well, under this, what you have just brought to our attention, April 18 has no application anymore. The new date is October 29 and the period goes back two years or three years from that date."

Hence, the net result was that the trial court ruled that, despite evidence of damages introduced on Plaintiffs' side of the case from June 30, 1976 to November 12, 1983, Plaintiffs were precluded by a statute of limitations from obtaining damages AFTER the suit was originally commenced in the U.S. District Court for the Western District of Pennsylvania. (October 29, 1982). Additionally, if the violation of the statute was not willful, then

the two year period prior to October 29, 1982. All of this transpired on the third and fourth trial days after Plaintiffs' closing argument to the jury, and after Plaintiffs presented to the jury their evidence for the period from 1976 to 1983.

Another problem area during the trial concerned the usage of a deposition of Mr. James Sutherland, a former officer of Defendant whose job duties included supervising the operations for the corporation at Cedar Crest College. The Defendant had scheduled the deposition for Sutherland in White Plains, N.Y. on July 25, 1986 at 9:00 A.M. Even before jury selection began, Plaintiffs counsel notified the trial court that there was a problem with the Sutherland deposition, namely the Defendant unilaterally and without cause terminated the deposition. When the Defendant indicated that it was going to use the deposition of Mr. Sutherland on its side of the case, Plaintiffs objected that it could not be used unless the jury was advised that

and unless the Plaintiffs were given a charge equivalent to an "adverse inference" charge for failure to call a witness in your exclusive control. The trial court specifically denied that request.

Thereafter, when Defendant proposed that the Sutherland deposition be read to the jury, Plaintiff requested that the portion of the Sutherland deposition concerning how the deposition was unilaterally terminated be read to the jury, and again the trial court refused. Hence, Defendant received the best of all possible worlds: it read the deposition of Sutherland into evidence, it limited the right of Plaintiffs' counsel to cross-examine the witness, and the jury was never given any indication that the deposition was incomplete or that Defendant exercised such control over a witness that it could cause him to leave in the middle of a deposition in order to avoid answering questions which were helping Plaintiffs' case.

was irrelevant because an Equal Pay Act case is not a civil rights case, the Plaintiffs were precluded from receiving damages for a period of greater than two or three years at most even if the practice was still continuing, and Defendant had the right to limit cross-examination of its main witness by telling the witness to go home at 3:00 P.M. during the middle of questioning without the jury ever being made aware of that fact--the jury returned a verdict in favor of Defendant and against Plaintiffs. Upon these facts, Plaintiffs petition this Honorable Court for a Writ of Certiorari.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in the case at bar under Rule 17(1)(a) of the Rules of the United States Supreme Court in that a Federal Court of Appeals has rendered a decision sanctioning a lower court order which has so far departed from the accepted

to call for an exercise of this Court's power of supervision.

ARGUMENT

I. WHETHER OR NOT THE TRIAL COURT DENIED PLAINTIFFS' THEIR RIGHT TO A FAIR TRIAL BY IMPROPERLY EXCLUDING EVIDENCE OF THE SEX OF PERSON EARNING THE HIGHER LABOR RATE ON PLAINTIFFS' CLAIM UNDER THE EQUAL PAY ACT UNDER THE ERRONEOUS THEORY THAT SEX DISCRIMINATION WAS NOT PART OF PLAINTIFFS' CLAIM UNDER THE STATUTE?

1. The trial court excluded evidence of the sex of person earning the higher rate on Plaintiffs' Equal Pay Act claim. Plaintiffs' contention was simple:

At Cedar Crest College,

1. Laborers--or groundscrew--or "outside janitors"--were and have always been exclusively male;

At Cedar Crest College,

2. Custodians--or "inside janitors"--were and have always been predominately female;

3. Laborers and custodians perform jobs requiring equal skill, effort and responsibility under similar working conditions;

4. Laborers are paid $.40 an hour more for their work solely because they are male.

The trial court appeared to understand that

and custodians perform jobs requiring equal skill, effort and responsibility under similar working conditions, and did not preclude Plaintiffs from presenting such evidence. Inexplicably, however, the trial court twice affirmatively precluded direct evidence on a crucial component of the Plaintiffs' case, namely, the laborers are male, and have always been male. Under a theory that defies logic, the trial court indicated to the jury that an equal pay case is <u>not</u> a sex discrimination case. The first instance occurred during the testimony of Carol Snyder:

> "THE COURT: Ms. Snyder, let me ask a couple of questions to see if I can understand something. At the present time among the custodians, who do what you do, there are some men and some women; is that right?
> THE WITNESS: Yes.
> THE COURT: You are all employed by Columbus Services International now?
> THE WITNESS: Yes, sir.
> THE COURT: At one time you were employed by the college and that was back before 1977. But since 1977, you are all being employed by Columbus Services?
> THE WITNESS: Yes sir.
> THE COURT: Now, I am sure they are

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for that mow the lawn: Do they work for Columbus Services or do they work for Cedar Crest?
THE WITNESS: They work for Columbus Services.
THE COURT: They work for--
THE WITNESS: We are all under the same contract.
THE COURT: They are now known as custodians. The people that mow the lawn, are they known as something else?
THE WITNESS: Grounds crew.
THE COURT: They would also plow the road and shovel the sidewalks in the wintertime when they are covered with snow?
THE WITNESS: Yes.
THE COURT: They are still taking care of the leaves on the grounds, taking them away from the building in the fall?
THE WITNESS: Yes.
THE COURT: And they are still delivering things to the dorms?
THE WITNESS: Paper goods.
THE COURT: Supplies and things you need?
THE WITNESS: Yes.
THE COURT: All right. Thank you."

REDIRECT EXAMINATION

"BY MR. ORLOSKI
Q. The people the judge has been talking about, are those people paid the same rate as the custodians?
A. No sir.
Q. The people that the Judge was just talking about, what is their sex?
A. They are all males.
MR. PUSKAR: Your Honor, I am going to ask that be stricken. This is not a

no relevancy to this cause of action, this lawsuit at all.
THE COURT: We will sustain the objection and strike the last question and answer and ask the jury to disregard it."

The second instance occurred in the testimony of Sharon Middlecamp Waitkus:

"Q. The laborers are all men?
MR. PUSKAR: Again, Your Honor, I am going to object. This question was stricken once.
MR. ORLOSKI: For the record, if you want to strike it again for me but I want it on the record.
MR. PUSKAR: It can't be on the record, Your Honor, if it is stricken.
MR. ORLOSKI: May I please ask the question bfore he objects?
THE COURT: We will permit the question to be asked.
BY MR. ORLOSKI:
Q. The laborers are practically all now male and have always been all male?
A. Yes. That's correct.
MR. PUSKAR: Same objection, Your Honor.
THE COURT: All right. We, of course, sustain the objection. Any other questions of the witness, Mr. Orloski?"

2. The exclusion of evidence of the sex of person earning a higher rate was improper. An Equal Pay Act case is a class civil rights action. See, Marshall v. City

Murphy, Female Wage Discrimination: A Study of the Equal Pay Act, 1963-1970 39 U.Cin.L.R. 615 (1970). In fact, it is limited exclusively to sex-based differentials in wages paid for performance of equal work, and as an essential prerequisite to a claim, Plaintiffs must demonstrate unequal pay for equal work because of sex discrimination. Corning Glass Works v. Brennan, 417 U.S. 188 (1974); Thompson v. Sawyer, 678 F.2d 257 (D.C., Cir, 1982); Wetzel v. Liberty Mutual Insurance Company, 449 F.Supp. 397 (W.D., Pa, 1978).

In its Opinion, the Third Circuit correctly found that the trial court twice excluded relevant, probative evidence of the gender of the laborers in a sex discrimination case under the Equal Pay Act, 29 U.s.C. Section 201 et seq.:

> "Despite the manifest statutory aim of eradicating sex-based wage discrimination, the trial judge ruled that the gender of the plaintiffs and of the allegedly preferred class lacked relevance."

evidence of the sex of the preferred class was prejudicial to Plaintiffs, erroneous as a matter of law, and inconsistent with the record before the Court. The court's holding of harmless error is at variance with this Court's standard of "fundamental fairness" as recently reiterated in Bennis & MacClean v. City of Allentown, et al., No. 86-1596.

The Court found that the jury had the import of this crucial evidence in front of them for the following reasons:

A) The trial judge advised the jury that the Plaintiff need only prove that a single person of the opposite sex received wages not equal to hers:

B) The CSI payroll registers for the period 1979 through 1982 were in front of the jury and they indicated the sex of the laborers v. custodians in that period;

C) Sutherland testified that the laborers were "generally" all male.

Court's conclusion that the exclusion of the evidence was "harmless", but rather are an affirmative indication that the exclusion of the evidence which Plaintiffs wanted to produce was prejudicial, and affected Plaintiff's substantial rights under Rule 61 of the F.R.C.P.

By the excluded, proferred testimony, Plaintiffs were attempting to prove two things: one, the laborers were male; and two, the laborers have always been male. The impact of this evidence was crucial to Plaintiffs' case, namely, male janitors get $.40 an hour more, and they have always received $.40 an hour more strictly because they are male.

The three references to the record which the Court contends "cures" the error are not instances of harmless error but rather proves that the exclusion of the crucial evidence affected Plaintiffs' substantial rights, namely, the opportunity to prove their case of sex discrimination.

opposite sex receiving higher wages is sufficient for sex discrimination.

The instruction as given by the trial on one male earning more is a correct statment of law. If this instruction is held in contradistinction to Plaintiffs' proferred excluded evidence, it does not cure the error but rather magnifies it. Plaintiffs were attempting to show a longstanding pattern of exclusive male dominance of the $.40 per hour differential in the category of laborers.

The trial court was saying that, if merely one male laborer was receiving the $.40 an houre differential, then Plaintiffs could prevail on the burden of proof. Technically, that is accurate. But for purposes of persuading the jury, Plaintiffs' evidence is a blockbuster: the custodians are male, and have always been male. The trial court's instruction is technical. If merely one male laborer gets the higher wage, Plaintiffs may have proven their case. But if all laborers get the $.40 differential, and all

have always been male, then more is involved than the burden of proof.

This evidence goes a long way towards Plaintiffs meeting their burden of persuading the jury that the Defendant practiced sex discrimination in paying laborers vis-a-vis custodians. If one male laborer proves the case for purposes of burden of proof, then the longstanding practice of giving the exclusively male laborers the $.40 an hour differential blows the defense out of the water. That is exactly the evidence which the judge said is "irrelevant" and was to be discarded. The prejudice to Plaintiffs in their burden to pursuade the jury is obvious.

B: <u>CSI payroll registers from 1979 through 1982</u>.

This Court appears to be saying that, even if Plaintiffs were not allowed to prove the gender of the custodians directly, they were allowed to prove it indirectly by the 1979 through 1982 CSI payroll records.

holding as a matter of law that juries know when trial judges make erroneous rulings on evidence, and juries can reverse the trial judges? Remember, the trial judge specifically told the jury to disregard the evidence. Does this mean that the jury knew more about the rules of evidence than the judge, went through the payroll records to check the gender of CSI employees, and then came up with the correct evidentiary ruling in disregard of the trial judge's instructions. Plaintiffs think not.

Even assuming, arguendo, that the jury did reverse the trial judge, do the 1979-1982 records offer the same evidence? Remember, Plaintiffs were also trying to get payroll records in for 1977, 1978 and 1983, and were specifically precluded by the Court from doing so. At best, the records on their face indicate that, between 1979-1982, the laborers were all male. That does not cure the error. The proferred excluded testimony

always been male. That is not proven by the records. The indirect evidence indicating that the laborers were all male for three years is not the substantial equivalent of the excluded evidence to invoke the harmless error standard. Again, the prejudice to Plaintiffs on their burden of persuading the jury is obvious. At a minimum, if Plaintiffs were required to prove the point indirectly, then the 1977, 1978 and 1983 payroll records ought to have gone out with the jury, and the failure to permit this cannot now be considered "harmless error."

C: Sutherland's deposition: laborers were "generally" all male.

The evidence was important: the laborers were male, and they have always been male. Sutherland would not even concede that. What does "generally" all male mean: It sounds like--well, yes, custodians were generally all male, but there were exceptions. That evidence by Sutherland does not cure

Sutherland made it appear that perhaps some of the laborers were female. That is why the testmony on Plaintiffs' side of the case was so crucial--the laborers were male, and have always been exclusively male. Defendant's witness would not even concede this crucial undisputed fact, and the jury was denied this relevant, probative evidence which was highly significant for Plaintiffs in their effort to persuade the jury that the Defendant practiced sex discrimination in paying wages.

In order to put this case in context, it must be remembered that the trial court already had the benefit of the Third Circuit's opinion in this matter, and that the defense lawyer who tried this case was the same lawyer who appeared and argued the first (and second) appeal.

It is respectfully submitted that the objection by defense counsel to the proferred relevant evidence was not a good faith objection, but rather an effort by defense counsel

judge. In other words, Defendant's counsel in the midst of trial understood how powerful and devastating the proferred evidence was, and he preferred an obvious erroneous ruling than let the damaging evidence be placed squarely in front of the jury:

The Third Circuit found as follows;

> "The district court's charge adequately put the plaintiffs' sex vis-a-vis that of the laborers at issue."

How was that accomplished? By the testimony of Sutherland which falsely inferred that maybe some of the laborers were female? By the limited records from 1979-1982 from which the jury could rummage through, conduct its own investigation, disregard the trial court's direction, and conclude that, for the limited period of time of 1979-1982, the laborers were all male? By the instruction to the jury that proof of one male laborer at the higher rate was sufficient to prove sex discrimination? The Plaintiffs had powerful evidence indicating a longstanding practice

janitors, and mostly women for inside janitors. No admissible evidence was ever admitted on this exact point, and only an inference was permitted that such was the case between 1979-1982 was established by the CSI payroll records.

The "harmless error" standard indicates that an evidentiary ruling excluding relevant evidence will only be used as a basis for reviewing and granting a new trial if a substantial right of a party is not affected. See, Rule 61 of F.R.C.P.; Muzyka v. Remington Arms Co., Inc. 774 F.2d 1309 (5th Cir, 1985): excluding evidence of a design change after the accident for impeachment was not harmless error in light of defendant's strategy; Crown Cork & Seal v. Morton Pharmaceuticals, Inc., 417 F.2d 921 (6th Cir, 1969); exclusion of crimp depth tests was not harmless error even though expert opinion was given because the test was crucial as a basis for the expert's opinion.

vant--and essential to a party's case--its exclusion cannot be regarded as harmless error. Hutton Norton Trust Co. v. Dorr County Chamber of Commerce, 467 F.2d 1075 (6th Cir, 1972).

Plaintiffs were obligated to prove sex discrimination in payment of wages. In order to prove sex discrimination, Plaintiffs attempted to show that outside janitors (laborers) are exclusively male, and have always been male, and were paid $.40 an hour more than inside janitors (custodians) who were predominately female. The trial judge never allowed the Plaintiffs to prove the first part of the equation, namely, that the laborers are exclusively male, and have always been male! It is respectfully submitted that nothing could be more essential to Plaintiffs' case. Defendants' counsel realized the imprtance of this evidence, and went to great lengths to distract the judge--and the jury--from hearing this

to prevail on the belated claim that the error was "harmless".

The constitutional right to a fair trial on a sex discrimination case requires that petitioner ought to have been able to tell a jury the plain, simple truth: the laborers were all male, and have always been male. The evidence was relevant. The exclusion was prejudicial. That is why the Defendant prevailed in front of the jury. Hence, Plaintiffs' Petition For Writ of Certiorari ought to be granted.

II. WHETHER OR NOT THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE TWO OR THREE YEAR STATUTE OF LIMITATIONS OF THE EQUAL PAY ACT EXCLUDED DAMAGES INCURRED AFTER THE FILING OF THE COMPLAINT, AND FURTHER ERRED IN HOLDING THAT THE STATUTE OF LIMITATIONS WAS NOT TOLLED DURING THE PERIOD OF TIME WHILE PLAINTIFFS' CLAIM WAS FILED IN THE EASTERN DISTRICT OF PENNSYLVANIA?

1. The statute of limitations is either two or three years. The statute of limitations under the Equal Pay Act, 29 U.S.C. Section 255(a) is clear: the complaint must be filed

accrues, but if the defendant acted willfully or intentionally, within three years of the accrual of the cause of action. Laffey v. Northwest Airlines, 567 F.2d 429 (D.C., Cir, 1976), cert denied 434 U.S. 1086 (1978). Additionally, it has been held that this 2-3 years statute of limitations can be tolled for equitable considerations. Specifically, in Partlow v. Jewish Orphans' Home 645 F.2d 757 (9th Cir, 1981), the Court held that the statute of limitations can be tolled after the filing of the suit while the court is awaiting proper execution of theconsents to sue.

2. Where an action is timely filed and thereafter dismissed on venue grounds, and a subsequent untimely action is filed in another forum, the action is timely filed because the statute of limitations is tolled during the period of the filing of the first and second actions.

Company, 390 U.S. 424 (1965)[1], the plaintiff timely filed an action under the Federal Employer's Liability Act in state court. Thereafter, the Ohio state court dismissed the action eight days after the expiration of the three-year statute of limitations. The Federal trial court dismissed the Federal action as untimely, and the decision was affirmed on appeal. On certiorari, the Supreme Court of the United States held that the employee's original timely State court action tolled the Federal statute of limitations where the State court action was dismissed on venue grounds, and the subsequent untimely Federal action was thereby timely made. Burnett, supra at 430.

3. A statute of limitations does not limit claims for damages caused after the filing of the complaint. Inexplicably, the trial court held that the statute of limitations

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[1]A copy of this opinion was given by Plaintiffs' counsel to the trial court during the trial.

period before the filing of the Complaint, but also barred any claims after the filing of the Complaint in the Western District.

As a general rule of law, the court has the authority to award damages occurring after the filing of the Complaint. Rea v. Ford Motor Co., 560 F.2d 554 (3d Cir, 1977); Calhoun v. U.S., 354 F.2d 337 (Co.Cl. 1965)[1]. There is no support in either the language or the logic of the 2-3 year statute of limitations of the Equal Pay Act, 29 U.S.C. Section 255(a) for the proposition that the statute of limitations precludes damages after the filing of the Complaint in the Western District.

4. Limiting the Plaintiffs' damages to the 2-3 year period immediately prior to the filing of the Complaint in the Western District is erroneous. The decision to limit

[1]A copy of these opinions were given by Plaintiffs' counsel to the trial court during the trial.

October 29, 1982 was erroneous for several reasons:

A) The original Complaint was filed in the Eastern District on August 31, 1979, and thereafter dismissed, without prejudice, because venue was in the Western District. Under the decision of the Supreme Court of the United States in Burnett v. NY RR Co. supra, the earlier date controls;

B) The decision by Judge Troutman was inexplicitly made without prejudice. By ignoring the filing date in the Eastern District, and using the later date of filing in the Western District, Judge Mencer turned Judge Troutman's dismissal without prejudice into a dismissal with prejudice;

C) The Federal rules specifically contemplate that Plaintiffs should not be prejudiced by the dismissal on venue grounds, and Judge Troutman ought to have transferred the action rather than dismiss it. See, 28 U.S.C. Section 1406(a);

tions was not raised until after Plaintiffs introduced into evidence on their case in chief damages for the years 1977, 1978, 1979, 1980, 1981, 1982 and 1983 so the Defendant waived the defense;

E) In the trial court's own Memorandum and Opinion dated February 8, 1983, the trial court held that the consents in the Eastern District action were the proper consents for determining the initiation of the action, and the subsequent decision that the statute of limitations runs from the date of the filing in the Western District is inherently contradictory.

5. The Plaintiffs were prejudiced by the chopping down of damages in front of the jury on both the beginning point and ending point of damages. It must be remembered that, prior to trial, defense counsel stipulated both to the authenticity and admissability of Plaintiffs' damage exhibits for the years 1977 through 1983 inclusive. It was only

damages that Defendant began having reservations about these damage exhibits. Despite these reservations, the trial court initially admitted them. Thereafter, during the defense side of the case, the trial court started expressing reservations, and noted that the difference in damage calculations was substantial. By continually subjecting Plaintiffs' claim to erroneous rulings, the trial court was implicitly telling the jury that Plaintiffs' case was really not worth that much. These erroneous rulings improperly denigrated Plaintiffs' claim before the jury and place Plaintiffs at an unfair disadvantage. In Plaintiffs' closing argument, counsel was forced to admit that he did not prove the damages that he told the jury he was going to prove.

Plaintiffs' damage calculation was legally correct. The Defendant--and the trial court--were incorrect in limiting damages for the 2-3 year period prior to

had to endure the prejudice of having their damage calculations denigrated before the jury. Hence, Plaintiffs' Petition For a Writ Of Certiorari ought to be granted.

III. WHETHER OR NOT THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE FROM WHICH THE JURY COULD INFER THAT, WHERE A DEPOSITION WAS UNILATERALLY TERMINATED BY DEFENDANT'S COUNSEL, THE INTERFERENCE WITH THE CONSTITUTIONAL RIGHT OF CROSS-EXAMINATION CONSTITUTED AN "ADVERSE INFERENCE" THAT FURTHER ANSWERS WOULD BE PREJUDICIAL TO THE DEFENDANT?

On July 25, 1986, Defendant scheduled a deposition for use at trial of James Sutherland, a former corporate officer of the Defendant who had immediate supervisory functions over custodians and laborers at Cedar Crest College. The deposition began at 9:00 A.M.

At page 93 of the transcript, Plaintiffs' counsel was advised for the first time that the deposition must be concluded at 3:00 P.M. even though the deposition would not be concluded:

> "Q. Let's just back up. I have just been advised by counsel for

that you are only prepared to sit here until 3 o'clock; is that correct?
A. Yes. That is my schedule

* * *

Q. Why can you only stay until 3:00?
A. I don't know how that is relevant.

* * *

Q. What is the reason you are leaving today at 3:00?
A. Because I have previous things scheduled.

* * *

Q. Why is the deposition being concluded at 3 o'clock?
A. Because I have previous commitments.
Q. What is the nature of the commitment?
A. I have a meeting with my superiors which cannot be postponed because I am being hospitalized tomorrow morning.
Q. How long is that meeting going to last?
A. I don't know. One has that sort of problem with ones superiors. That you are sort of at their disposal.
Q. What is your expectation of the length of that meeting?
A. I do not know. I would expect that it would be concluded by 5:00.
Q. So we can resume at 5 o'clock then?
A. That certainly is conceivable.
Q. So I am prepared to be hear at 5:00 or at a spot designated by you to continue this deposition.
A. It is notincumbent upon me to designate, and I really don't understand--

* * *

MR. PUSKAR: I will tell you Mr. Orloski, right now, I will tell you right now on the record that we are

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get about doing that.

* * *

Q. But you will be available today after 5:00?
A. For a short period.
Q. I am available after 5:00."

Thereafter, at 3:00 P.M., true to his word, defense counsel took his witness and his court reporter and left the deposition never to return.

In simple terms, at 3:00 P.M., in the middle of cross-examination, defense counsel summoned his witness--and his court reporter--and unilaterally terminated the deposition leaving it unequivocally clear that, even though the deposition could have been resumed at 5:00 P.M. on that date, he was not willing to do so, and left the only available option of rescheduling the deposition on August 26, 1986 which, coincidentally, was the day after the jury verdict.

Plaintiffs' counsel immediately advised the court of the problem of the incomplete deposition prior to trial. Plaintiffs made a simple request of the trial judge: read

and give the Plaintiffs the equivalent of an adverse witness charge. The trial court refused to do either, and instead allowed the deposition to be read into evidence with the jury never knowing that Plaintiffs' counsel was denied his right to cross-examine the witness by the Defendant. This was in error.

Under the Federal Rules of Evidence, Rule 611, cross-examination may only be limited to the subject matter of direct examination and matters affecting credibility. At no time did Defendant ever complain that the cross-examination of Sutherland was not related to the subject matter of the direct examination. At no time did the Defendant ever elect to make an emergency oral motion to the trial court to limit or terminate the cross-examination because it was being done under bad faith or in such a manner as to unreasonably annoy, embarrass or oppress the deponent.

James Sutherland was the Defendant's main witness--an ex-corporate officer who directly

Crest College maintenance contract. During cross-examination, he made crucial admissions favorable to the Plaintiffs, including one that the actual job functions of the laborers and custodians overlapped, and while the laborers and custodians were performing exactly the same work, the male laborers were paid $.40 an hour more. It is no surprise that the Defendant wanted to limit cross-examination of Sutherland.

Once the decision to walk out of the deposition was made, however, Plaintiffs had the right to let the jury know how the deposition was terminated for two reasons: 1) the circumstances concerning the unilateral termination of the deposition was relevant on grounds of credibility to show that the witness, even though an ex-corporate officer, was taking direction from defense counsel; and 2) the jury should have been instructed that the failure to call as a witness a person whom that party exclusively controls

creates an adverse inference that any further evidence offered by the witness would been unfavorable to the Defendant. See, Garrett v. Faust, 9 F.R.D. 482, vacated on other grounds 183 F.2d 625 cert denied 340 U.S. 931 (1951).

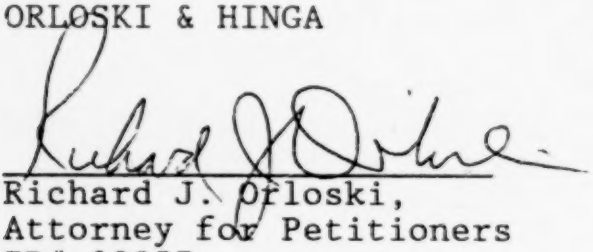
In the case at bar, the Plaintiffs were prejudiced in two specific instances by allowing the deposition to be read into evidence without advising them how the deposition was terminated: 1) Defendant was able to create the appearance for the jury that Sutherland as an ex-corporate officer of Defendant was independent of the Defendant when, in fact, he elected to be controlled by its lawyer; and 2) the jury was led to believe by Defendant that Plaintiffs could get no further admissions from Sutherland except that the work of the laborers and custodians overlapped when, in fact, Plaintiffs' inability to get further damaging admissions was the result of Defendant's unilateral termination of the deposition.

As a matter of Due Process of Law guaranteed by the Fifth Amendment, hiding from the jury how the Sutherland deposition was terminated was prejudicial error entitling Plaintiffs to a new trial. Hence, the Court of Appeals erred in denying Plaintiffs' motion for a new trial.

CONCLUSION

For the foregoing reasons, Plaintiffs' Petition For a Writ of Certiorari ought to be granted.

ORLOSKI & HINGA



Richard J. Orloski,
Attorney for Petitioners
ID# 09857

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-3532

ELEANORE A. BROBST, PATRICIA M. HEINEY, MARIE M. FRITZ, SHARON M. MIDDLECAMP, LUELLA M. HAMM, VERNA MILLWARD, ROBERT LEE LITTLE, ROBERT N. BUCKWALTER, MARIAN E. STETTLER, S. MIESSNER, DENNIS G. COOK, JEAN R. BERGER, and ELIZABETH S. LeVAN
JEAN R. BERGER, EXECUTRIX OF THE ESTATE OF MARIE M. FRITZ, MADELINE DORNEY, CARMELLA HAWK, DONALD LAKOVITZ, ELAINE SEISLOVE, CAROL SNYDER, BERNARD POLIT, SCOTT REHRIG, and VICTOR BORTZ

vs.

COLUMBUS SERVICES INTERNATIONAL, a corp. and WALTER R. MORGAN, Indiv. and as Officer of Deft. Corp.

ELEANOR L. BROBST, JEAN BERGER, SHARON M. MIDDLECAMP, ROBERT BUCKWALTER, MARIAN E. STETTLER, MADELINE DORNEY, JEAN R. BERGER, Executrix of the Estate of MARIE M. FRITZ, VERNA S. UNDERCUFFLER, CLAUDIA WOTTA, ALICE S. MEISSNER, DENNIS G. COOK, CAROL SNYDER, DONALD LAKOVITZ, CARMELLA HAWK, ELAINE SEISLOVE, BERNARD POLIT, and SCOTT REHRIG,

Appellants

Appeal from the United States
District Court for the
Western District of Pennsylvania
(Pittsburgh)
(D.C. Civil No. 82-2283)

Argued
May 12, 1987
Before: GIBBONS, Chief Judge,
MANSMANN, Circuit Judge,
and KATZ, District Judge.*

(Filed July 27, 1987)

Richard J. Orloski, Esq. (ARGUED)
Orloski & Hinga
1005 S. Cedar Crest Boulevard
Allentown, Pennsylvania 18103

COUNSEL FOR APPELLANTS

Paul M. Pushkar, Esq. (ARGUED)
Baskin Flaherty Elliott & Mannino, P.C.
2900 One Mellon Bank Center
Pittsburgh, Pennsylvania 15219

COUNSEL FOR APPELLEE

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* Honorable Marvin Katz of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

MANSMANN, Circuit Judge.

This matter comes before us on appeal from a judgment upon a verdict in favor of the defendant, Columbus Services International ("CSI"), in the plaintiffs' action under the Equal Pay Act of 1963. See, 29 U.S.C. § 201 note (1982); 29 U.S.C. § 206 (d) (1982)[1]

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[1] 29 U.S.C. § 206(d) states in relevant part:

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: PROVIDED, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of subsection, reduce wage rate of any employee.

We possess jurisdiction pursuant to 28 U.S.C. § 1291 (1982). We find that the district court adequately charged the jury that the plaintiffs bore the burden of proving that CSI had discriminated against them on the basis of sex. Moreover, evidence regarding the gender of, and wages paid to, the plaintiffs and the allegedly preferred CSI employees reached the jury in the form of payroll records. Thus, the trial judge's error in twice excluding testimony concerning the sex of CSI's employees was harmless. We will, therefore, affirm the district court's judgment.

The plaintiffs are present or former maintenance employees of Cedar Crest College ("Cedar Crest" or "the college") in Allentown, Pennsylvania. Before July 3, 1977, the college classified the workers as either "laborers" or "custodians". The laborers were all male and earned forty cents per hour more than the custodians who were, all but one, female. Cedar Crest paid this premium to the laborers

averredly since they maintained the college grounds and so had chores relatively heavier than the custodians' tasks. The laborers also occasionally had to operate floor buffers, rug shampooers, and similar power equipment indoors. The custodians, on the other hand, cleaned rest rooms, vacuumed and dusted, and emptied trash. However, a custodian would receive the $.40 per hour premium whenever he had to perform "laborers' work".

On July 3, 1977, CSI took over the maintenance work at Cedar Crest. CSI then reclassified all of the employees as "custodians" and compensated them at the lower, custodian scale without altering their duties. Four employees filed grievances. An arbitrator thereupon ordered CSI to pay the premium to custodians while they did laborers' work. CSI refused on the ground that a consent decree in an unrelated Equal Pay Act case barred CSI from paying different wages for

substantially equal work. CSI then petitioned the Department of labor ("DOL") to approve CSI's position, but DOL opined that CSI should have to compensate all of its custodians at the higher, laborer rate.

The plaintiffs, in turn, sued CSI, alleging violations of the Equal Pay Act and of the consent decree.[2] The district court, on CSI's motions in limine and for summary judgment, found no breach of the consent decree by CSI, concluded that the custodian and laborer jobs in no way constitued "equal work" for Equal Pay Act purposes, and granted

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[2] The district court for the Eastern District of Pennsylvania dismissed the suit without prejudice to allow the plaintiffs to bring their complaint before the district court for the Western District of Pennsylvania which supervised the consent decree. See Emrick v. Bethlehem Steel Corp., 624 F. 2d 450, 453 (3rd Cir. 1980). We affirmed in Brobst v. Columbus Services Int'l, 709 F. 2d 1490 (3d Cir. 1983).

summary judgment for CSI since the plaintiffs supposedly failed to establish a prima facie case that "CSI equalized male and female wage rates at a lower 'female' rate." Brobst v. Columbus Services Int'l, 582 F. Supp. 830, 834 (W.D. Pa. 1984).

On appeal, we vacated and remanded. Brobst v. Columbus Services Int'l, 761 F. 2d 148 (3d Cir. 1985). We determined that the district court erroneously decided the motion in limine on different grounds than CSI asserted, effectively transformed the motion into one for summary judgment and, thereby, precluded the plaintiffs from marshalling evidence to show a genuine issue of material fact on the "equal work" question. Id. at 154. We further held that the district court improperly made factual findings instead of accepting CSI's proffered theory on CSI's motion for summary judgment. Id. at 157-58.

At trial, the plaintiffs introduced evidence that, inter alia, the custodian and

laborer work required equal skill, effort, and responsibility and offered similar working conditions. When the plaintiffs sought to prove that the laborers were all males, however, the trial judge sustained the defendant's relevancy objection.

> MR. ORLOSKI [for the plaintiffs]: The people the Judge has just been talking about [the laborers], are those people paid the same rate as the custodians?
>
> MR. SNYDER [plaintiff]: No, sir.
>
> MR. ORLOSKI: The people that the Judge was just talking about, what is their sex?
>
> MR. SNYDER: They are all males.
>
> MR. PUSKAR [for the defendant]: Your Honor, I am going to ask that be stricken. This is not a civil rights case. It doesn't matter what sex they are. It has no relevance to this cause of action, this lawsuit at all.
>
> THE COURT: We will sustain the objection and strike the last question and answer and ask the jury to disregard it.

Subsequently, a similar exchange occurred.

> MR. ORLOSKI: The laborers are practically all now male and have always been all male?
>
> MS. MIDDLECAMP-WAITKUS [plaintiff] Yes. That's correct.

MR. PUSKAR: Same objection, Your Honor.

THE COURT: All right. We, or course, sustain the objection. Any other questions of the witness, Mr. Orloski?

The jury returned a verdict for the defendant. This timely appeal followed.

The plaintiffs present three points of error. First, they argue that the district court improperly excluded proof of the gender of the plaintiffs and of the laborers on the fallacious theory that a plaintiff's sex lacks relevance in an Equal Pay Act case. Second, the plaintiffs contend that the trial judge wrongly refused to admit evidence that the defendant's counsel unilaterally terminated the deposition of James Sutherland, a former CSI officer, and to grant the plaintiffs request for an adverse inference charge. Finally, the plaintiffs insist that the district court erred in holding as a matter of law that the applicable statute of limitations[3] precluded the plaintiffs from recovering damages incurred after they filed their

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[3] Title 29 U.S.C. § 255(a) (1982) provides:

> Any action commenced on or after May 14, 1947, to enforce any causes of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacn-Davis Act--
>
> (a) if the cause of action accrues on or after May 14, 1947--may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued[.]

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complaint and, further, in ruling that the statute continued to run while the case remained pending in the Eastern District of Pennsylvania. See supra note 2.

On appeal, our review of the trial judge's relevance rulings in plenary. In re Japanese Electronic Products Antitrust Litigation, 723 F. 2d 238, 269 (3d Cir. 1983). We evaluate the district court's decision on points

for charge by an abuse of discretion standard. United States v. Fischback and Moore, Inc., 750 F. 2d 1183, 1195 (3d Cir. 1984). We must "determine whether the charge, taken as a whole and viewed in the light of the evidence, fairly and adequately submits the issues in the case to the jury." Id., quoting Ayoub v. Spencer, 550 F. 2d 164, 167 (3d Cir.), cert. denied, 432 U.S. 907 (1977). At all events, "[t]o the extent the parties challenge the choice, interpretation, or application of legal precepts, we always employ the fullest scope of review[.]" Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F. 2d 98, 102 (3d Cir. 1981).

We turn first to the allegation which we consider most serious--that the district court twice excluded from the jury testimonial evidence which would show that each job category was filled almost exclusively by the members of one sex. On the two occasions

cited above, the district court cited relevancy grounds in excluding the evidence. We conclude that the district court erred in excluding the evidence.

By the Equal Pay Act, Congress sought "to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry--the fact that the wage structure of 'many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.'" Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974), quoting S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963). The Supreme Court, accordingly, has emphasized that "[i]n order to make out a case under the Act, the [complaintant] must show that an employer pays different wages to employees of the opposite sexes' for equal work on jobs the performance of which requires equal skill,

effort, and responsibility, and which are performed under similar working conditions.'" Corning Glass Works, 417 U.S. at 195 (emphasis added), quoting 29 U.S.C. § 206(d)(1) (1982). Indeed, our initial opinion in this matter, which vacated the district court's judgment for the defendant and remanded the case for further proceedings, repeatedly stressed that lucid mandate. See Brobst, 761 F. 2d at 150.

Despite the manifest statutory aim of eradicating sex-based wage discrimination, the trial judge inexplicably ruled that the gender of the plaintiffs and of the allegedly preferred laborer class lacked relevance. Nonetheless, we hold that error harmless in light of the record. The district court's charge adequately put the plaintiffs' sex via-a-vis that of the laborers at issue, and the jury received, among other evidence, CSI payroll records noting the gender of each employee.

Fed. R. Civ. P. 61 states the familiar standard for adjudging whether error is harmless.[4] As the rule provides, we will reserve the district court only if its error "affect[s] the substantial rights of the parties."

Here, the trial judge's jury instruction managed to rectify the substantial error of

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[4]Rule 61 states:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

his evidentiary rulings. The court charged:

> The Equal Pay Act, roughly speaking, prohibits wage discrimination based upon sex or [sic] the performance of equal work. It provides in pertinent part as follows. No employer subject to this section shall discriminate between employees on the basis of sex by paying wages to employees at a rate less than the rate at which he pays wages to employees of the opposite sex for equal work on jobs, the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions.
>
> In order to prevail on their claim... the Plaintiffs must prove that they and members of the opposite sex have been employed by Columbus Services International doing equal work on jobs, the performance of which requires equal skill, effort and responsibility.

...If you find as a fact that Columbus Services International consolidated most of the work previously done by the male labor force with the work done by the male labor force with the work done by the predominantly female custodians at the lower custodian rate, that would constitute a violation of the Equal Pay Act provided that the work previously performed by the laborers and custodians required equal skill, effort and responsibility and was performed under similar working conditions.

...Finally, the Plaintiffs must prove that the distinction in pay rates was based on sex or that they have been discriminated against on the basis of their sex. In other words, Plaintiffs must show that they have been paid less because they are women and in determining this issue, you consider all the evidence in the case.

Following a post-charge conference at side-bar among the court and counsel, the court further instructed the jury:

> We will also charge this jury that for purposes of proving their claim, the Plaintiffs initially need only to prove that there is a single person of the opposite sex who received wages not equal to hers for substantially equal work for the same establishment. If you find the Plaintiffs met their initial burden, then the burden shifts to the employer to produce evidence of an affirmative defense that some factor other than sex explained the differential between the higher male rate and the lower female rate.

Thus, the record evinces that the district court sufficiently put in issue the gender of CSI's employees.

Moreover, even though the court twice excluded testimony relating to the sex of the

laborers, the jury learned that information from other evidence in the record. Most significantly, CSI's payroll registers for 1979 through 1982 were admitted into evidence and the jury had the use of them during its deliberations.[5] Those records indicate that the laborers were men and the custodians were, except one, women. As well, during the defendant's case, counsel read into evidence

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[5] Before trial, the defendant stipulated to the authenticity and admissibility of, inter alia, CSI's payroll registers for July 16, 1977 through November 12, 1983. The court admitted these records into evidence during the plaintiffs' case over CSI's objection, noting that they "ha[d] relevance as to computing the damages claimed." The court later ruled, however, that the plaintiffs could collect damages only for the two or three years prior to filing their complaint on October 29, 1982 and, therefore, withdrew from the jury the registers for 1977, 1978, and 1983. The plaintiffs specifically excepted to this change.

the deposition of James Sutherland, the former CSI vice-president, who conceded on cross-examination that the laborers "generally" were all male.[6]

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[6]Sutherland testified as follows:

> MR. ORLOSKI: Do you agree there was a differential between laborers and custodians?
>
> MR. SUTHERLAND: Yes.
>
> MR. ORLOSKI: Do you agree that the differential was 40 cents an hour?
>
> MR. SUTHERLAND: Yes.
>
> MR. ORLOSKI: Do you agree that the differential for operating power equipment was 40 cents an hour?
>
> MR. SUTHERLAND: Yes.
>
> MR. ORLOSKI: Do you agree that the laborers were all men?
>
> MR. SUTHERLAND: Generally they were.
>
> MR. ORLOSKI: Do you agree that the custodians were all women except for Robert Buckwalter?
>
> MR. SUTHERLAND: When?
>
> MR. ORLOSKI: During the period when Columbus Services International took over the contract, you had all women custodians except for Robert Buckwalter. Yes or no?
>
> MR. SUTHERLAND: Is that accurate?
>
> MR. ORLOSKI: I am asking you, your recollection.

MR. PUSKAR: I can't tell you.

MR. SUTHERLAND: My recollection is that at the time I had hundreds of employees. I believe that Buckwalter, based upon that documentation that I have seen regarding this case, was the only man. But, if we find, based on a further look at the employee list, that there was a second one, I will agree to that. Yes.

Reed Raudenbush, the one-time physical plant supervisor for CSI at Cedar Crest, on cross-examination also related the gender of CSI's employees.[7]

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[7] MR. ORLOSKI: So essentially, then[,] you had roughly 16 custodians?

MR. RAUDENBUSH: My recollection is that there were 17.

MR. ORLOSKI: Seventeen custodians and four laborers?

MR. RAUDENBUSH: That is right.

MR. ORLOSKI: That is the ratio?

MR. RAUDENBUSH: That's right.

MR. ORLOSKI: Custodians were paid less and laborers were paid more.

THE COURT: And the laborers were men?

MR. RAUDENBUSH: The four laborers were men. That's correct.

MR. ORLOSKI: And the custodians were women except for Buckwalter when he came on?

MR. RAUDENBUSH: That's correct.

In light of this record we must label harmless the district court's error of twice excluding proof of the sex of the laborers.

The plaintiffs next argue that the district judge wrongly denied them leave to read to the jury the end of Sutherland's deposition which, the plaintiffs aver, CSI's counsel unilaterally terminated. They also insist that the court should have charged the jury members that they could infer that Sutherland would have answered further questions by the plaintiffs adversely to CSI.

The principle that the trial judge possesses discretion to control the extent of cross-examination and to refuse points for charge requires no citation of authorities. Even when the district court rules incorrectly in this regard, the harmless error standard may prevent us from ordering a new trial.

Recently the Supreme Court subjected a constitutionally improper denial of a criminal defendant's opportunity to impeach a witness for bias to harmless error analysis. See Delaware v. Van Arsdall, ___U.S.____, 106 S. Ct. 1431, 1438 (1986).

Assuming, arguendo, that the district judge erred here, Van Arsdall is instructive. There, the Court listed five factors by which reviewing courts should gauge whether a given error is harmless.

> These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, or course, the overall strength of the prosecution's case.

Id.

First, CSI's examination of Sutherland

occupies thirty-four pages of transcript in the trial record. Sutherland testified to the job content and pay rates of the various employees at Cedar Crest, particularly the laborers and custodians. It seems manifest, though, that his testimony played a less-than-important role in CSI's case. Second, Reed Raudenbush succeeded Sutherland in 1973, appeared at trial, and related essestially the same information on direct examination as Sutherland. Third, after hearing Sutherland's deposition read in open court, Raudenbush unequivocally agreed with Sutherland's testimony. The plaintiffs had every opportunity to cross-examine Raudenbush and could have discredited him on the same bases as Sutherland.

Fourth, the plaintiffs' cross-examination of Sutherland runs for 141 pages of the trial transcript. The record indicates that, although CSI's counsel averredly stopped

Sutherland's deposition two hours early, the plaintiffs' lawyer deposed him for approximately four hours. We cannot say, then, that the plaintiffs were not permitted a sufficient chance to interrogate Sutherland. Fifth, even if the damaging potential of Sutherland's complete deposition were fully realized, CSI's case would support the verdict here. Sutherland stated that about five percent of the custodians' and laborers' tasks overlapped. Yet his testimony nowhere hints that he might budge from that position to concede in any way that those jobs were substantially the same. Nothing, finally, in the excluded portions of Sutherland's testimony proves anything relevant to this case. The deposition appears solely to call into question defense counsel's, not Sutherland's, credibility.

We, therefore, conclude that any error in the district court's refusal to permit the plaintiffs to read Sutherland's whole deposition to the jury, or to give an adverse

inference charge, was harmless. We similarly hold harmless the trial judge's error of twice excluding as irrelevant the proffered testimony regarding the gender of CSI's laborers. That evidence reached the jury from other evidence of record. Because of the opinion we reach on these liability-related issues, we need not decide whether the district court erroneously held that the statute of limitations precluded the plaintiffs from recovering damages incurred after filing the complaint and that the statute continued to run while the case was pending in the Eastern District of Pennsylvania.

The district court's judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-3532

Eleanore A. Brobst, etc.

Appellants

vs.

Columbus Services, etc.

SUR PETITION FOR REHEARING

PRESENT: GIBBONS, Chief Justice, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERT, Circuit Judges, and KATZ, District Judge.*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

Carol Mansmann, Circuit Judge

* Honorable Marvin Katz of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.